In the last analysis the matter does come down to a choice of two evils, and courts of different jurisdictions, even when applying the same general principles, may reach different results in the same class of cases, according as the fixed sentiment of the public may differ in matters of public policy or of political expediency.[23] Undoubtedly there is a presumption against the extraterritorial application of statutes in the absence of specific terms requiring it,[24] but it is obvious on the other hand that the paramount importance frequently accorded to the *lex loci* renders absolutely futile many pages of our statute books. Furthermore, in view of the above-mentioned right of a State to refuse to recognize the validity of specified classes of foreign marriages, of other recognized exceptions to the so-called general rule, and of the great practical difficulties in the way of a complete application of the *lex domicilii*,[25] it is impossible ever wholly to avoid the unpleasant possibility of a person being married in one jurisdiction and not in another.

RIGHTS OF THE OWNER OF LAND SUBJECT TO A PRESCRIPTIVE EASEMENT OF FLOWAGE OR DIVERSION OF WATERS.—Since an easement could only be conferred by grant[1] the common law presumption of an easement resulting from immemorial usage[2] was nothing more than an assumption that a grant had been made,[3] for upon no other hypothesis could the long submission of the servient tenant be explained.[4] But this presumption was not conclusive,[5] and where the acquiescence could be explained by showing either that a license had been given,[6] or that the enjoyment had not been adverse,[7] or that the servient owner was incapable of granting the easement claimed,[8] the prescription failed. It follows, therefore, that the nature of the acquiescence of the servient tenant, rather than the fact of enjoyment by the dominant tenant, is the controlling element.[9] A failure to keep this principle clearly in mind has often led courts to anomalous results in cases where the servient estate received a benefit from the easement. Thus, in the recent case of *Fin and Feather Club* v. *Thomas* (Tex. 1911) 138 S. W. 150, where the defendant by means of a dam had im-

[23]Pennegar *v.* State *supra.*

[24]1 Bishop, Marriage, Divorce and Separation, § 866.

[25]See *ibid.* § 848.

[1]Goddard, Law of Easements, (6th ed.) 198.

[2]Termes de la Ley, 487; 2 Bl. Com., (Lewis' ed.) § 264.

[3]Angus *v.* Dalton (1877) L. R. 3 Q. B. D. 85, 113.

[4]"It is the fact of his being thus exposed to an action and the neglect of the opposite party to bring suit, that is seized upon, as the ground for presuming a grant." Opinion in Felton *v.* Simpson (N. C. 1850) 11 Ired. L. 84; Hanson *v.* McCue (1871) 42 Cal. 303.

[5]Smith *v.* Miller (Mass. 1858) 11 Gray 145.

[6]Wiseman *v.* Lucksinger (1881) 84 N. Y. 31.

[7]"If they had no right to complain in the first instance we are not driven to the presumption of the grant of an easement to account for why they did not complain." Opinion in Hanson *v.* McCue *supra.*

[8]Barker *v.* Richardson (1821) 4 B. & A. 579.

[9]Ames, Disseisin of Chattels, 3 Harv. L. Rev. 318; 10 COLUMBIA LAW REVIEW 761.

pounded the waters of a lake during the prescriptive period, and thus created upon the plaintiff's land a larger artificial lake, about which the latter had made expensive improvements, the doctrine was laid down that the servient owner acquired by the same act a reciprocal easement to have the water maintained at the artificial level.[10] So also it has been held that where one obtained a prescriptive right to divert the waters of a stream, landowners who were materially benefited thereby obtained simultaneously a corresponding easement to have the diversion continued.[11] It is impossible, however, to justify these results upon the theory of a reciprocal easement in the servient tenant,[12] because he has done nothing adverse,[13] and therefore, for the reasons above stated, the silence of the dominant tenant does not give rise to the presumption of a grant. It would be equally logical to hold, where one obtains an easement of eavesdrop against another's land, that the latter obtained a reciprocal right to have the dripping forever continued because the water was useful to him for watering his garden.[14]

It remains to be considered whether there are other grounds upon which may be based a right in the servient tenant to the continuance of the artificial conditions. It would seem that a change which, because of its nature and the purposes for which it was made, is to all appearances a permanent substitute for the natural condition, would constitute in effect a representation that the new condition is permanent, and therefore should afford to those who have changed their position in reliance thereon an apt case for the application of the doctrine of equitable estoppel.[15] Some courts have held that under these circumstances the artificial condition becomes the natural condition, resting their decisions upon principles of dedication;[16] but it is

[10]Kray *v.* Muggli (1901) 84 Minn. 90, reversing 77 Minn. 231. This doctrine seems to have originated in a *dictum* in Belknap *v.* Trimble (N. Y. 1832) 3 Paige 577, 605.

[11]Mathewson *v.* Hoffman (1889) 77 Mich 420; Shepardson *v.* Perkins (1878) 58 N. H. 354.

[12]"An easement exists for the benefit of the dominant estate alone, and the servient owner acquires no right to insist on its continuance, or to ask for damages on its abandonment." Cockburn C. J. in Mason *v.* Shrewsbury, etc. Ry. Co. (1871) L. R. 6 Q. B. 578, 585; Greatrex *v.* Hayward (1853) 8 Exch. 291; Oliver *v.* Lockie (1849) 26 Ont. Rep. 28. A similar conclusion has been reached in many of the American cases. Peter *v.* Caswell (1882) 38 Oh. St. 518; Lake Drummond Canal & Water Co. *v.* Burnham (1908) 147 N. C. 41; Felton *v.* Simpson *supra;* Hanson *v.* McCue *supra.* See 3 Farnham, Waters and Water Rights, § 819.

[13]The title to the submerged soil remains in the servient tenant, Brookville Hydraulic Co. *v.* Butler (1883) 91 Ind. 134, and he is entitled to any use thereof which does not materially interfere with the easement, such as placing booms and wharves in the water, Jordan *v.* Woodward (1855) 40 Me. 317, fishing therein, Sullings *v.* Carter (1895) 105 Mich. 392, or removing ice therefrom. Lathrop *v.* Haley (1891) 81 Iowa 649.

[14]This doctrine would logically result in the manifest absurdity of giving to one against whom a prescriptive way had been acquired, the right to prevent the owner of the easement from ceasing to use it.

[15]3 Farnham, Waters and Water Rights, § 827-*c.* For the difference between legal and equitable estoppel, see 10 COLUMBIA LAW REVIEW 76.

[16]Delaney *v.* Boston (Del. 1839) 2 Harr. 489; Ford *v.* Whitlock (1855) 27 Vt. 265. In a few cases of this kind the courts also approved of the theory of reciprocal easements. Shepardson *v.* Perkins *supra;* Broadwell Drainage Dist. *v.* Lawrence (1907) 231 Ill. 86.

doubtful if the theory of dedication is applicable in cases where the public is not involved, whereas estoppel, as pointed out above, is a more impregnable ground upon which to place this result. When, however, the artificial condition is created by structures perishable in character and for a temporary purpose, obviously persons interested have no right to act on the assumption that it is permanent, and if they do, they must take the consequences.[17] It should make no difference that the dominant tenant remained silent, because under such circumstances there is no duty to speak;[18] and even if such silence were considered a representation, it would only be one of intention, which, by the better view, cannot be the basis for an estoppel.[19] Furthermore, there can never be an estoppel when the party to whom the false representation is made had knowledge, or means of knowledge, of the true facts,[20] and it must be presumed that a reasonable man knows that an artificial condition created for a temporary purpose is likely to be abandoned at any time.[21]

Although, as above indicated, an easement thus acquired may be abandoned, it is nevertheless well established that so long as the dominant tenant chooses to retain the right, he cannot vary the user to the surcharge of the servient estate, but may be held strictly within the terms of the fictional lost grant.[22] Since the terms of this grant are indicated by the user made[23] it has been correctly held that where there was no intention of abandonment, the owner of a dam and easement of flowage could not draw off the water below the level at which it had stood during the prescriptive period, when to do so would inflict an additional injury upon the servient tenement;[24] but for the purpose of making necessary repairs, a temporary lowering should be permitted.[25] Therefore, as the defendant in the principal case showed

[17]3 Farnham, Waters and Water Rights, § 827-*c*; Peter *v.* Caswell *supra.*

[18]Pocahontas Light Co. *v.* Browning (W. Va. 1903) 44 S. E. 267; Madson *v.* Spokane, etc. Co. (1905) 40 Wash. 414.

[19]Ewart, Estoppel, 68; Langdon *v.* Doud (Mass. 1865) 10 Allen 433; White *v.* Ashton (1873) 51 N. Y. 280.

[20]Brant *v.* Virginia Coal & Iron Co. (1876) 93 U. S. 326, 337.

[21]Peter *v.* Caswell *supra.*

[22]3 Farnham, Waters and Water Rights, § 819-*b.*

[23]Wimbledon Conservators *v.* Dixon (1875) 1 Ch. R. 362.

[24]Smith *v.* Youmans (1897) 96 Wis. 103. There is *dictum* in this decision supporting the doctrine of reciprocal easements, and the case is often cited for that proposition.

[25]The grant of an easement carries with it the incident right to make necessary repairs, Liford's Case (1615) 11 Rep. 46-*b*, 52-*a*; Pomfret *v.* Ricroft (1670) 1 Wms.'s Saund. 323, and this is equally true of easements of flowage. DeBaun *v.* Bean (N. Y. 1883) 29 Hun 236; Frailey *v.* Waters (1847) 7 Pa. 221. The inconvenience resulting from such repairs must be borne by the servient tenant, Prescott *v.* White (Mass. 1838) 21 Pick. 341, and the fact that the dominant tenant has not made use of the right within the time of memory does not extinguish it. McMillan *v.* Cronin (1878) 75 N. Y. 474; Prescott *v.* White *supra.* So, the owner of a dam and water privilege may drain off the pond for such purposes, even though it inflicts injury upon other riparian owners, DeWitt *v.* Bissell (1905) 77 Conn. 530; State *v.* Sunapee Dam Co. (1900) 70 N. H. 458, but the injury thus inflicted must be no greater than is reasonably necessary. Pratt *v.* Brown (1895) 106 Mich. 628; Boynton *v.* Rees (Mass. 1830) 9 Pick. 528.

no intention of abandoning his easement, and as the draining was not for purposes of repair, the right to lower the waters could have been denied upon the ground last stated.[26]

CY PRES DOCTRINE AS APPLIED TO CHARITABLE GIFTS.—The *cy pres* doctrine as to charitable gifts is in England applied not only by the Crown by virtue of its prerogative power as *parens patriae,* but also by Chancery in the exercise of its extraordinary but inherent equity jurisdiction.[1] Although in either case the rules of approximation to the donor's intention are similar,[2] the instances in which the powers are exercised are distinct.[3] Cases where the administration devolves upon the Crown are confined to those where no trust is interposed and the charitable objects are left wholly undefined, or become so through the failure of the object particularly designated.[4] Equitable jurisdiction on the other hand would seem to depend, in the orthodox view, upon the existence of a trust,[5] though the particular beneficiaries may be entirely indefinite.[6] In America it is the prevailing doctrine that our courts have no equivalent for the royal prerogative, and that *cy pres* administration is accordingly to be limited by the inherent powers of equity.[7] The foregoing distinction, however, is not recognized in New York, where the doctrine of *cy pres* is deemed wholly inapplicable,[8] and it has been overlooked or misapprehended in other States, where charitable gifts have been administered without the interposition of a trust.[9]

The *cy pres* application of a gift is the closest approximation to the original plan of the benefactor which is reasonably practicable.[10] It would seem, therefore, that since, where a gift is to "charity" *simpliciter,* the choice of objects is limited only by the legal definition of a charity,[11] the designation by the court of any charitable object whatsoever is a literal rather than an approximate fulfilment of the donor's intention. These cases, however, are as a matter of fact generally treated under the *cy pres* doctrine,[12] and the disposal of such bequests is to be governed by the testator's predilections so far as manifested.[13]

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[26]Smith *v.* Youmans *supra.*

[1]Moggridge *v.* Thackwell (1803) 7 Ves. Jr. 36, 86.

[2]Att'y Gen'l *v.* Mathews (1676) 2 Lev. 167; Moggridge *v.* Thackwell *supra,* 87.

[3]Moggridge *v.* Thackwell *supra.*

[4]Moggridge *v.* Thackwell *supra.*

[5]Ommaney *v.* Butcher (1823) Turn. & R. 260, 270; Att'y Gen'l *v.* St. John's Hospital (1865) 2 De G. J. & Sm. *621, *635.

[6]Lewis *v.* Allenby (1870) L. R. 10 Eq. *668; Harrington *v.* Pier (1900) 105 Wis. 485.

[7]Newson *v.* Starke (1872) 46 Ga. 88; Grimes *v.* Harmon (1871) 35 Ind. 198, 220; Dickinson *v.* Montgomery (Tenn. 1851) 1 Swan. 348; Hoffen's Estate (1888) 70 Wis. 522.

[8]Tilden *v.* Green (1891) 130 N. Y. 29.

[9]State *v.* Gerard (N. C. 1842) 2 Ired. Eq. 210; Howard *v.* Am. Peace Soc. (1860) 49 Me. 288, 302.

[10]Ingraham *v.* Ingraham (1897) 169 Ill. 432.

[11]Philpott *v.* St. George's Hospital (1859) 27 Beav. 107; *Re* Ashton's Charity (1859) 27 Beav. 115.

[12]Story, Eq. Jur., § 1169 *et seq.*

[13]2 Freeman, 261 (1702) 330-*b.*